

**MEMORANDUM OF UNDERSTANDING BETWEEN THE CITY OF
ALBUQUERQUE AND THE ALBUQUERQUE BERNALILLO COUNTY
WATER UTILITY AUTHORITY**

This Memorandum of Understanding ("MOU") is entered into on this 21st day of March, 2007 by and between the City of Albuquerque ("City") and the Albuquerque Bernalillo County Water Utility Authority ("Authority").

WHEREAS, Laws 2003, Chapter 437, (codified as NMSA 1978, § 72-1-10)(as amended by the Laws of 2005, Chapter 345) created the Albuquerque Bernalillo County Water Utility Authority, effective June 21, 2003;

WHEREAS, the Authority is a political subdivision of the state of New Mexico and was granted all powers necessary to operate a public water and wastewater utility. NMSA 1978, § 72-1-10 (2003);

WHEREAS, the legislation creating the Authority required that "[a]ll functions, appropriations, money, records, equipment and other real and personal property pertaining to the Albuquerque water and wastewater utility shall be transferred to the Albuquerque Bernalillo County Water Utility Authority." NMSA 1978, § 72-1-10 (2003);

WHEREAS, the City, County and Authority entered into a Memorandum of Understanding dated January 21, 2004 (hereinafter the "Initial MOU"), for the purpose, among other things, of temporarily adopting certain City policies and procedures;

WHEREAS, the Initial MOU was amended on April 7, 2004, to recognize the joint use of staff, to recognize additional policies and procedures and to further facilitate the transition of City and County assets under the control of the Authority;

WHEREAS, in 2005 the New Mexico Legislature substantially amended Chapter 10, Articles 7E and 11, to facilitate the transfer and retention of benefits of certain member/employees transitioning from one public employer to another and to facilitate collective bargaining issues as it concerned employees transitioning from one public employer to another; and

WHEREAS, the Initial MOU was further amended on September 22, 2006, to extend the term of the Initial MOU to June 30, 2007; and

WHEREAS, effective July 1, 2007, City water and wastewater utility employees will no longer be City employees and all managerial, operations and maintenance responsibilities associated with the utility shall be fully assumed by the Authority; and

WHEREAS, given the termination of the Initial MOU and the transition of City assets and personnel to the Authority, the City and the Authority agree that the City shall provide certain administrative services to the Authority.

IT IS AGREED between the City and Authority that:

1. Term. This MOU shall commence on July 1, 2007, and shall remain in full force and effect until June 30, 2012, unless sooner terminated by agreement of both the City and Authority.
2. Prior Agreements. The Initial MOU, as amended, is of no further effect, is void and deemed terminated as of July 6, 2007.
3. Transfer. The parties expressly recognize that State law mandated that all functions, appropriations, money, records, equipment and other real and personal property pertaining to the City water and wastewater utility were transferred to the Authority.
 - a. As set out more fully below, on July 1, 2007, all water and wastewater employees and related functions are deemed transferred to the Authority from the City.
 - b. Except for the limited functions set out below, effective July 7, 2007, the Authority shall be responsible for all functions of the water and wastewater utility including any and all management, operations, and maintenance regarding all aspects of the utility.
4. Personnel and Employee Benefit Services. Effective July 7, 2007, the City and Authority agree as follows:
 - a. The employees of the City water and wastewater utility shall become employees of the Authority. A tentative list of such employees is attached to this MOU as Exhibit A. A finalized Exhibit A will be completed prior to July 1, 2007.
 - b. All transferred City employees shall be transferred with all accrued sick and vacation balances reflected on the balance sheet of the Enterprise. The Authority shall continue its obligation for such leave balances as July 7, 2007.
 - c. The Authority may participate in the City employee benefits program upon the following conditions:
 - 1) The Authority:
 - a) The Authority shall be subject to all the terms and conditions of City provider agreements for those benefits in which the Authority participates. The provider agreements include Presbyterian Health Plan, CIGNA Health Plan, UCCI Dental, Delta Dental, and Davis Vision, as these providers may change from time to time.
 - b) The Authority shall review its group voluntary benefit programs and determine the merits of participation in the City-sponsored benefit programs, such as voluntary life, disability, deferred compensation programs,

and all other applicable benefit programs. To the extent that adoption of any of these programs is to the benefit of the employees and the Authority, the City and the Authority shall effectuate the transition to such group programs, if possible, by July 1, 2007.

c) The Authority shall administer eligibility, enrollment, and participation criteria in the same manner as the City, as required by City provider agreements, as permitted by City Rules and Regulations, entitled "Insurance Administrative Provisions" and any other City policies. Service contracted individuals shall not be eligible to participate in benefits under this agreement.

d) The Authority shall conduct verification of eligibility in accordance with City standards, as may be modified, in a satisfactory manner as determined by the City.

e) The Authority shall make advance monthly premium payments directly to providers.

f) The Authority shall develop and maintain a premium prepayment and reconciliation system as required by City provider agreements.

g) The Authority shall administer the benefits program(s) covered by this Agreement in a manner to protect the integrity of group utilization of medical services and financial resources within the program.

h) The Authority shall be responsible for all costs associated with the administration of authority employee participation in City employee benefit programs, including payment of premiums and other miscellaneous administration costs, including but not limited to printing and mailing, incurred for Authority employees.

i) Default in Payments. In the event the Authority fails to make premium payments to a provider within the grace period required in the provider Agreement, the provider may suspend its performance and the Authority employees shall not be eligible for coverage until such time as payment by the Authority is made in full as specified in the Provider Agreement.

2) The City:

a) The City shall conduct periodic audits of Authority eligibility, enrollment, verification, payment, reconciliation and other criteria designed to assure that the program is being administered in accordance with the provisions of this Agreement and group provider agreements.

b) The City shall assist the Authority with benefits staff training, interpretation of provider agreements and advocating on behalf of employees in administering the benefits.

c) The City shall assist the Authority in conducting open enrollment meetings and in otherwise providing technical benefit interpretations and explanations.

d. Benefits Personnel.

1) The Authority represents that it has, or will secure at its own expense, all personnel required to perform all of the benefits services as provided under Section 4. Such personnel shall not be employees of or have any contractual relationships with the City.

2) None of the benefits work or services covered by this Agreement shall be subcontracted without the prior written approval of the City. Any work or services subcontracted hereunder shall be specified by written contract or agreement and shall be subject to each provision of this Agreement.

e. The Authority shall maintain its own Personnel Policies and Procedures which cover all personnel matters, including classification, compensation, and labor contracts.

f. The City will provide all personnel services to process and record employment actions taken by the Authority or its employees pursuant to standard City procedures based on a mutually agreed upon cost allocation plan or method. The Authority shall keep and maintain all employee records for the Authority. Personnel services will include new employee enrollment, orientation, pre-employment medical examinations, drug testing, resignation, retirement, discharge, and training. Authority employees will be eligible to attend City training programs. The Authority will have the right to use the City's hearing officers and mediators to hear employee grievances.

g. With respect to transferred employees, the Authority shall be the successor in interest of all labor contracts until the termination date reflected in each such contract.

h. The Authority may adopt a separate wage and salary schedule for its employees.

5. Financial and Accounting Services. Effective July 1, 2007, the City and Authority agree as follows:

a. Accounting. The City shall provide all general ledger accounting services for the Authority, to include, among other things, assistance in the preparation of the Comprehensive Annual Financial Report, accounts receivable and accounts payable services. Such services shall be provided on a negotiated fee basis recognizing that accounts receivable shall be based on Authority transactions and accounts payable costs shall be allocated based on Authority transactions. Charges for all other accounting functions shall be based on a mutually agreed upon cost allocation plan or method.

b. Payroll. The City shall perform all payroll related functions based on a mutually agreed upon cost allocation plan or method. The Authority will transfer funds for payroll, PERA, FICA, and RHC according to a schedule agreed upon by the City and the Authority.

c. ISD/Call Center. The City shall provide Information Services Department (or successor department) services, including telephone, communications and utility billing system support, and 311 Citizen Contact Center services based on a mutually agreed upon cost allocation plan or method.

d. Risk Management. The City shall provide all risk management related services to the Authority, including the investigation and adjustment of claims. The City will cover the Authority and its employees under the City's self-insurance program or alternatively, purchase liability insurance to cover the Authority's tort liability for which immunity has been waived under the New Mexico Tort Claims Act and to cover the Authority's Workers Compensation

exposures. The Authority will contribute to the Risk Management Fund the premium cost of any insurance purchased for the Authority and contribute to the self-insurance program based on a three year historical trend.

e. Treasury/Investment Pool. The City shall provide cash handling, debt service payments and banking services to the Authority based on a mutually agreed upon cost allocation plan or method. The Authority shall be solely responsible for its debt management. The Authority agrees to provide its funds to be included in the City's investment pool, such funds to be separately tracked and accounted for.

f. Procurement. The City's Purchasing Division will act as the procurement office for the Authority and will oversee and process procurement actions for the Authority through the City's procurement and financial processing systems in accordance with the City's Public Purchases Ordinance and all current rules and regulations, policies and practices. Any necessary selection advisory committee shall be empanelled by the Authority and the selection of recommended contractors for award of contracts shall be made by the Authority's selection advisory committee. The Authority will provide legal review and the City Purchasing Officer shall provide administrative and procurement review of any Authority procurement. The Authority may acquire goods and services by any other means as provided for in the State Procurement Code and Section 72-1-10 NMSA, 1978; however, the City's Purchasing Division and Purchasing Officer shall not oversee or be responsible for such procurements. At such time as the Authority elects to follow solely the New Mexico Procurement Code or any other means of procurement, then the City shall no longer act as the procurement office for the Authority or oversee its procurement actions. The Authority shall provide the City with 60 days notice of any such change in its procurement processes and the parties shall work together to determine what assistance may be provided to the Authority by the City in such circumstance. It is agreed that existing procurement contracts used exclusively by the Authority, but administered and in the name of the City, shall be assigned to and assumed by the Authority effective July 1, 2007. The Authority's use of the City's procurement processing system, or, the City's use of an Authority procurement contract, shall be based on a mutually agreed upon cost allocation plan or method.

g. Building Costs. The Authority may lease at fair market value and use for its operations, City property that is currently occupied by the Authority and that has not been transferred to the Authority by state law. A list of the property currently occupied is attached hereto as Exhibit B. The Executive Director and the Chief Administrative Officer shall agree to the final floor plan and adjusted square footage as tentatively reflected in Exhibit B. A finalized Exhibit B will be completed prior to July 1, 2007.

h. City use of Authority Billing System. The Authority agrees to provide the City use of its billing and collection system for the City Solid Waste Department or other City agency based on a mutually agreed upon cost allocation plan or method.

i. Budget. The City will permit the Authority use of its budget

system to develop and maintain the Authority's budget based on a mutually agreed upon cost allocation plan or method.

6. Fleet and Warehouse Services. The City will provide fleet maintenance and warehouse services to the Authority at a cost based on a three year historical trend subject to review and approval by the Authority.

7. Storm Drain Stations. The Authority shall maintain and operate the City's Storm Drain pump stations based on the cost to provide such service to the City. The existing City employees assigned shall become Authority employees.

8. Use of Authority Real Property. The City may lease and use real property of the Authority based on the fair market value of the property. Nothing contained herein shall be construed to create an indebtedness by the City in violation of the Bateman Act or constitute a charge against the general credit or taxing power of the City or Authority.

9. Dispatch Services. The Authority shall provide night and weekend dispatch services for the City based on a mutually agreed upon cost allocation plan or method.

10. Lab Testing. The Authority shall provide water, soils and other lab testing services to the City at the Authority's cost to provide such services to the City.

11. Composting Material. The Authority shall provide compost to the City at the same rate provided to other commercial users. The City shall have priority rights to any compost material.

12. Capital Support. The Authority shall provide its own capital program support, but utilize the City's systems for processing based on a mutually agreed upon cost allocation plan or method. The Authority shall implement its own input, review and approval mechanism for all Capital support services.

13. Legal Services. The Authority shall provide its own legal services. However, on a case by case basis, as requested by the Authority, the Authority may procure legal services from the City. The Authority and the City agree that the Authority shall be billed for such service by direct bill evidenced by a time sheet billing in quarter-hour increments or as otherwise negotiated.

14. The Authority or City may utilize additional services not expressly listed in this MOU, on such terms and conditions as may be mutually agreed upon, if requested in writing by either party and based on a mutually agreed upon cost allocation plan or method.

15. The Authority will establish a utility review board to review all construction standards and ownership policies for water and wastewater utility facilities in the City's Development Process Manual (DPM) and other relevant Authority or City ordinances and regulations. The utility review board shall make recommendations to the City and the Authority with respect to changes in the DPM and City and Authority regulations or ordinances with respect to construction standards and ownership policies for water and wastewater utility facilities. The City and Authority agree to take all necessary action, legislative, or otherwise, to facilitate any of the recommendations. The City will enforce the Authority's construction standards and ownership policies for water and wastewater utility facilities through the DPM. The City Engineer shall have the authority to accept the authority's water and sewer infrastructure improvements under the City's Procedure B subdivision improvements agreement.

The City will be responsible for the management of the Authority's infrastructure agreements and related financial guarantees, and construction inspection. Payment will be made to the City by the Authority for City Engineering fees.

16. While City real and personal property pertaining to the Albuquerque Bernalillo County Water and Wastewater Utility transferred by operation of law in accordance with Laws 2003, Chapter 437, (codified as NMSA 1978, § 72-1-10)(as amended by the Laws of 2005, Chapter 345), it is expressly recognized by the City and the Authority that additional transferring documentation shall be required to properly document title to all properties, real, personal, mixed or otherwise, and all extensions, enlargements and improvements thereto. In furtherance of completing the transfer or assignment of any property to the Authority, the Authority and City agree that the present use and character of any parcel contemplated for transfer or assignment shall not be altered unless the parties agree otherwise in writing. In the event property not contemplated for transfer or assignment is presently used by the Authority, the City agrees to not alter the property's present use and character unless the parties agree otherwise in writing. Further, the parties agree that the present use and character of any parcel shall be given weight in the event it is unclear whether such property was acquired using City enterprise or general fund monies. Accordingly, the City agrees to provide any deeds, assignments, title transfers or other relevant documentation necessary to perfect title to all properties, real, personal, mixed or otherwise that the parties agree transferred by operation of law. A rough list of properties to be transferred or assigned is attached to this MOU as Exhibit C. The Authority and the City shall by July 1, 2008, jointly develop a final list of properties, together with legal descriptions, that were transferred to the Authority by operation of law.

17. No ambiguity shall be construed against any party based on the identity of the author or authors of this MOU. The parties acknowledge that this

MOU was negotiated as an arms length transactions and that each party was represented by counsel.

18. Any liability incurred by either party in connection with this MOU is subject to the immunities and limitations of the New Mexico Tort Claims Act, Section 41-4-1, et. seq. NMSA 1978, as amended. Neither party waives sovereign immunity, any defense and or any limitation of liability pursuant to law. No provision in this MOU modifies or waives any provision of the New Mexico Tort Claims Act.

19. By entering into this MOU, the parties do not intend to create any right, title or interest in or for the benefit of any person other than the parties. No person shall claim any right, title or interest under this MOU or seek to enforce this MOU as a third party beneficiary of this MOU.

20. Each party shall abide by all applicable federal and state laws and regulations. In any action or legal dispute arising from this MOU, the parties agree that the laws of the State of New Mexico shall govern.

21. The City and the Authority agree to use any and all methods of dispute resolution, up to and including mediation and binding arbitration, to resolve conflicts arising under this Agreement, the expenses of which shall be shared equally by the parties. Disputes shall be first discussed by representatives of each party having authority. If the parties are unable to resolve the dispute through informal mechanisms or mediation with 30 days of the occurrence of the event or circumstances giving rise to the dispute, either party may give notice to the other that the dispute is to be submitted to binding arbitration in accordance with the New Mexico Arbitration Act. In the event the parties cannot agree to a proposed arbitrator, the guidelines of the New Mexico Arbitration Act shall be used to select an arbitrator. The provisions of the New Mexico Arbitration Act shall govern the conduct of the arbitration, rendering of an award, enforcement of the award and all other aspects of the arbitration.

In the event that the either party is in dispute regarding a cost allocation plan or method for services, the parties jointly will choose an independent third party to determine the appropriate methodology and cost. The parties shall equally bear the cost of the third party's services.

22. Neither the City nor the Authority shall be responsible for liability incurred as a result of the other party's acts or omissions in connection with this Agreement.

23. This MOU incorporates all the agreements, covenants, and understandings between the parties hereto concerning the services to be performed hereunder, and all such agreements, covenants and understandings have been merged into this MOU. This MOU expresses the entire MOU and understanding between the parties with respect to said services. No prior

agreement or understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this MOU.

24. In case any one or more of the provisions contained in this MOU or any application thereof shall be invalid, illegal or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein and any other application thereof shall not in any way be affected or impaired thereby.

25. Within 30 days of the adoption of this MOU the City and Authority shall develop a transition team to carry out the provisions outlined herein.

26. This Agreement shall not be effective until signed by both parties.

27. Notice to terminate services. The Authority or the City may terminate any or all of the services that one party has agreed to provide to the other party as set forth in this MOU upon one year prior written notice to the other party.

IN WITNESS WHEREOF, each Party has executed this agreement on the date first written above.

CITY OF ALBUQUERQUE

By: 

Bruce J. Perlman, PhD, Chief Administrative Officer

Date: 3/21/07

APPROVED AS TO FORM:



Robert M. White, City Attorney

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY

By: 

Mark S. Sanchez, Executive Director

Date: 3/21/07

APPROVED AS TO FORM:



Mann Winter, Authority Attorney